

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

RONALD KOZLOWSKI,

Plaintiff,

Case No. 2005-2855-CH

vs.

TATIANA OGNJAN,

Defendant.

OPINION AND ORDER

Defendant filed a motion for summary disposition under MCR 2.116(C)(4) and (C)(10).

I

According to plaintiff's complaint, filed July 18, 2005, on February 23, 2004, plaintiff and Ronald Ognjan executed a contract to remodel a basement and hallway of Mr. Ognjan's home in Warren. The agreed-upon cost for the work was \$6500, to be paid at the time Mr. Ognjan sold his home. Mr. Ognjan died in July, 2004; he was married to defendant at that time. Plaintiff filed a Claim of Lien on the property on July 19, 2004, however, there was an error made in the identification of the property. Defendant sold the property on October 7, 2004 to Allison L. Perry. Defendant filed a counter-claim against plaintiff on August 31, 2005, for one count of conversion; however, defendant has agreed to stipulate to dismiss her counter-claim because she is unable to locate the missing statements or discover what happened to all the money withdrawn in "cash", as claimed. On October 3, 2005, a stipulated order was entered by this Court dismissing plaintiff's Count I, foreclosure of construction lien, leaving only a claim for "unjust enrichment." Defendant now moves for dismissal.



2005-002855-
CH
00019365397
OPNIMGCC

II

A motion for summary disposition which challenges the trial court's subject matter jurisdiction is properly brought under MCR 2.116(C)(4). Subject matter jurisdiction is the right of the court to exercise judicial power over a class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending. *Bowie v Arder*, 441 Mich 23, 39; 490 NW2d 568 (1992). A court's subject matter jurisdiction is determined by reference to the allegations in the complaint. *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 707; 575 NW2d 68 (1997). Jurisdictional questions under MCR 2.116(C)(4) are questions of law. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). When reviewing a motion under this subrule the court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law or whether the affidavits and other proofs show there was no genuine issue of material fact. *Bock v General Motors Corp*, 247 Mich App 705, 710; 637 NW2d 825 (2001).

Alternatively, a motion for summary disposition under MCR 2.116(C)(10) challenges the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); *Klein v Kik*, 264 Mich App 682, 685; 692 NW2d 854 (2005). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, and the disputed factual issue must be material to the dispositive legal claims. *State Farm v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). The Court must

consider all pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Corley, supra* at 278.

III

A

The Court finds it has subject matter jurisdiction as plaintiff originally filed a complaint for foreclosure on a construction lien, MCL 570.1118, which provides that an action to enforce a construction lien through foreclosure shall be brought in the circuit court for the county where the real property described in the claim of lien is located. No authority has been presented that would require this Court to remove this case to a lower court just because the foreclosure claim has been dismissed. Thus, summary disposition under MCR 2.116(C)(4) is unwarranted.

B

The remaining issue in this case is plaintiff's claim of unjust enrichment. The elements of a claim for unjust enrichment are (1) receipt of a benefit by the defendant from the plaintiff, and (2) which benefit it is inequitable that the defendant retain. *B&M Die Co v Ford Motor Co*, 167 Mich App 176, 181; 421 NW2d 620 (1988).

Plaintiff contends that a contract was entered into between the parties wherein \$7500 was to be paid for the renovation work of defendant's bathroom. The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement and mutuality of obligation. *Johnson v Douglas*, 281 Mich 247; 274 NW 780 (1937). A contract is made when both parties have executed or accepted it, and not before. *Brown v Considine*, 108 Mich App 504, 507; 310 NW2d 441 (1981). Mere discussions and negotiation, including unaccepted offers, cannot be a substitute for the formal requirements of a contract. *Kirchhoff v Morris*, 282 Mich 90, 95; 275 NW 778 (1937). A mere expression of intention does

not make a binding contract. *Hammel v Foor*, 359 Mich 392, 400; 102 NW2d 196 (1960). The burden is on plaintiff to show the existence of the contract sought to be enforced. *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992).

Here, even though plaintiff contends there was a contract, he has failed to meet his burden of proof. The purported contract, as the Court views it, is a mere unilateral expression of intent of the now deceased. There is nothing to show a mutuality of agreement or obligation. Incidentally, assuming the Court did consider the document a proper contract, an equitable claim of unjust enrichment cannot be imposed where there is an express, albeit unenforceable, contract covering the same subject matter. See *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Nonetheless, the Court finds there was no contract between the parties.

This being the case, the question becomes whether plaintiff suffered damages through an act of unjust enrichment. The evidence presented to the Court answers this question in the negative. Roger Kirk, as Personal Representative of the deceased's estate, attested in an affidavit that plaintiff told him that the deceased had purchased and paid for all the material for the job, and that he had, at most, "\$3000" worth of labor into the job, but had not kept any records for his hours on the job. Plaintiff also stated the deceased had already paid him \$1500; thus, the only thing owing, at most, would be another \$1500. Further, the affiant attested that plaintiff stated he undertook to help his friend with the work while he was living with him, as a favor; that he never really expected to be paid.

Further, in his deposition, plaintiff stated, "We were good friends helping each other out and he agreed to give me this, so that's why we did it for what we did it for. It was just me down there helping a good friend out, you know. He was in need and we've been friends all our lives and he agreed to pay me this, so we made this out. That was it."

Plaintiff has a "Residential Builder License", a copy of which was attached to his brief. There are certain restrictions on this license however, and it appears that plaintiff violated some of the restrictions. According to correspondence from the Licensing Administrator of the Department of Labor & Economic Growth, 'the license will allow a person/company to build a house from the ground up, *except for plumbing, electrical, and plumbing work, which must be performed by a licensed plumbing, electrical, or plumbing contractor.*' (Emphasis added.) According to his deposition, plaintiff put in electrical lines and light switches, and installed a shower stall and drain. He also put the fixtures in for the shower. Prior to commencing the work, plaintiff did not pull a permit from the City of Warren.

On November 2, 2005, Special Permits were issued by the City of Warren for purposes of inspecting the plumbing and electrical work done by plaintiff. Although partially illegible, the plumbing inspector's comments included, "Bathroom appears to have been remodeled without inspections and permits." A list of violations were attached, which included,

1. "2" shower drain el is not compliant with 3002.3 (not a sanitary el).
2. Side inlet quarter bend not allowed for lav drain when connected to water closet 3005.2
3. Sanitary tee not allowed for horizontal to horizontal or horizontal to vertical connection.
4. 2" shower drain has 4' x 2" tee 3005.1 Shower trap not vented 3201.3
5. Unable to determine if lav is vented due to concealed piping.
6. Drainage piping not supported 2605
7. Plumbing permits were not pulled and rough inspection and final inspection not requested. All rough plumbing concealed 2503.2.

The electrical inspection included the following violations:

1. No permit was secured for electrical work done WCO 9-61
2. No inspections were made WCO 9-67
3. Unlawful electrical contracting WCO 9-79
4. Failure to register with City WCO 9-76
5. Ceiling fan improperly wired
6. Grounding conductors to be mechanically connected
7. Bathroom must be on own 20 amp circuit

8. Wiring improperly installed and not secured
9. Devices not properly supported
10. Box not securely fastened in place.

The inspections were done after the current owner of the property contacted Roger Kirk regarding the "poor workmanship" done in the bathroom. The current owner was considering a lawsuit against plaintiff because of this.

Keeping in mind that a person who has been unjustly enriched at the expense of another is required to make restitution to the other, see *B&M Die Co, supra*, the Court is not convinced that plaintiff is entitled to demand restitution given the fact that the current owner will undoubtedly have to spend far more money to bring the bathroom up to code than plaintiff put into workmanship. Further, plaintiff admitted he would have done the work for free because he was a "good friend" to the deceased. Plaintiff admitted he did not purchase any of the building materials as he only contributed to the labor. In addition, the personal representative attested that prior to the deceased's death, he asked him if he owed plaintiff any money for any reason and he replied that he had paid plaintiff "in full" for everything – including giving plaintiff his car. Furthermore, the deceased's wife's affidavit attests that she believes the car was given by decedent to plaintiff as full payment for the work in the bathroom, and not as payment for personal care. The affiant also attested that plaintiff's name was added to one of decedent's bank accounts, and that he had withdrawn money from decedent's bank account. Thus, in the interests of equity and justice, the Court finds plaintiff has already been more than reasonably compensated for the work he did for his long-time friend. On the proofs presented Plaintiff cannot maintain a claim for unjust enrichment.

IV

Based on the foregoing, it is hereby

ORDERED defendant's motion for summary disposition under MCR 2.116(C)(10) is GRANTED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order resolves the last pending matter and the case is CLOSED

SO ORDERED.

DATED:

Peter J. Maceroni,
Circuit Judge

cc: Doug Womack
John Harrington

PETER J. MACERONI
CIRCUIT JUDGE

MAY 30 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK

BY: *Carmella Sabaugh* Court Clerk